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Employer Lawsuits Against Employees—The Right To Invoke The Legal Process Despite Anti-Union Motivation Or Coercive Effect On Section 7 Rights

On November 15, 1974, John E. Sanford was discharged by Power Systems, Inc. for failing to perform his assigned work as a mill-wright on a turbine generator disassembly crew.[1] Sanford filed charges with the National Labor Relations Board (Board), alleging he had been fired because of union activity. The Board officer in charge of Subregion 38, however, refused to issue a complaint against Power Systems since he found no evidence that Sanford had been discharged for engaging in protected conduct. Sanford's subsequent appeal was dismissed by the Office of Appeals of the General Counsel. Approximately eighteen months later, Sanford filed similar charges with the Occupational Safety and Health Administration (OSHA), alleging that complaints he had filed regarding unsafe working conditions had motivated his dismissal. These charges were dismissed by the Department of Labor.[2]

Power Systems subsequently discovered that Sanford had filed unfair labor practice charges against labor organizations and former employers in forty-six separate cases since 1967.[3] Excluding the instant decision, only one case had resulted in a Board order; the remaining forty-four cases had either been withdrawn, dismissed, or settled.[4] Power Systems filed a civil complaint against Sanford on September 6, 1977, alleging that he had filed charges with the Board and OSHA without probable cause with the intention of harassing Power Systems.

Power Systems sought recovery of legal fees incurred in de-

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1. Sanford, a union steward, had engaged in protected activity "which disrupted the job and caused it to fall seriously behind schedule." Power Systems, Inc., 239 N.L.R.B. 445 (1978), *enforcement denied*, 601 F. 2d 936 (7th Cir. 1979).

2. 239 N.L.R.B. at 445-46.

3. *Id.* at 446. Thirty cases involved charges against labor organizations and the remainder involved charges against employers. *Id. See also* Power Systems, Inc. v. NLRB, 601 F.2d 936, 937 (1979).

4. Charges were voluntarily withdrawn by Sanford in 27 cases, the board dismissed the charges in 13 cases, and four cases were settled. One case led to a Board Order. *Power Systems, Inc.* represented the 46th action filed by Sanford. 239 N.L.R.B. at 446.

fending these charges as well as a permanent injunction enjoining Sanford from filing cases in any federal, state, or administrative court against them.[5] However, the Board held that by suing Sanford, Power Systems had violated section 8(a)(1) and (4) of the National Labor Relations Act (NLRA),[6] since such action had "the unlawful objective of penalizing Sanford for filing a charge with the Board, and thus, depriving him of, and discouraging [other] employees from seeking access to the Board's processes."[7] The Board required Power Systems to withdraw its suit against Sanford and to make Sanford whole for all legal expenses he incurred in the defense of Power Systems' lawsuit.[8] The Court of Appeals for the Seventh Circuit refused to enforce the Board's order, finding no evidence of improper motive on the part of Power Systems in filing its complaint against Sanford.[9]

I. Accommodating an Employer's Right to Sue

A. Clyde Taylor Co.

In *Clyde Taylor Co.*,[10] Mr. Taylor was the superintendent of the sheet metal department in a mechanical contracting firm that was owned and operated by a partnership. In April, 1958, the partnership dissolved, and arrangements were made with Taylor to take over the sheet metal business.[11] He immediately exercised employer prerogative by firing the union steward[12] and by informing the remaining employees that they "could continue

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5. *Id.* On December 20, 1979, the request for an injunction was deleted. *Id.* at 446-47.

6. (a) It shall be an unfair labor practice for an employer —
   (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
   . . . .
   (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter . . . .

29 U.S.C. § 158(a)(1), (4) (1976).

7. 239 N.L.R.B. at 449.

8. *Id.* at 450.

9. Power Systems, Inc. v. NLRB, 601 F.2d 936, 940 (7th Cir. 1979).

10. 127 N.L.R.B. 103 (1960).

11. *Id.* at 104.

12. *Id.* at 105. Frank Houston, the union steward, had filed grievances with the Board "concerning Taylor's alleged hiring of too many apprentices and his use of unqualified laborers to do sheet metal work." *Id.* One employee testified that prior to Houston's discharge, Taylor had warned that " 'Frank Houston was getting too big for his own good in this union business and it looked like he was going to let him go.' " *Id.*

to work for him unless 'they wanted to stick with the Union.' "[13] Four employees, who expressed allegiance to the Union, were paid in full and instructed " 'to get their tools and get out.' "[14] Shortly thereafter, Taylor applied for and obtained a state court injunction banning picketing by the Union.[15]

Unfair labor practice charges were subsequently filed against Taylor. The trial examiner heard testimony that Taylor had told one of the charging parties that he should not have signed charges against him, that the employees had caused him public embarrassment, and that they " 'were opening [themselves] wide open to a libel suit.' "[16] The Board adopted the trial examiner's conclusion that Taylor impliedly threatened to sue for libel in retaliation for the charges filed against him, "and that the threat, in the context made, constitute[d] an unfair labor practice."[17] However, the Board insisted that by condemning threats it did not question the normal right of all persons to *resort to the civil courts* to adjudicate their claims.[18]

In fact, the Board rejected the trial examiner's finding that Taylor had violated Section 8(a)(1) of the NLRA by obtaining the state court injunction banning peaceful picketing.[19] The trial examiner had relied on the Board's earlier decision in *W.T. Carter & Bro.*,[20] which held that an employer's use of legal proceedings to discourage employees from exercising their rights under the NLRA rather than to advance any legitimate interest

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13. *Id.*

14. *Id.*

15. *Id.* at 106.

16. *Id.* at 108. Taylor asked the employee " 'to talk to some of the boys and try to get them to drop it.' " *Id.*

17. *Id.* The Board stated that:

> Such a threat, express or implied, is of a harassing nature. It would normally tend to intimidate an individual contemplating filing a charge, from doing so, or one, who has filed a charge, to withdraw it. Accordingly, we agre [sic] with the Trial Examiners that such a threat restrains employees in the exercise of the right to file charges under the Act and thus is coercive and violative of Section 8(a) (1).

Id.

18. "We interdict here only the *making of a threat* by an employer to resort to the civil courts as a tactic calculated to restrain employees in the exercise of rights guaranteed by the Act." *Id.* (emphasis added). Had Taylor simply filed an action for libelous publication rather than threatened such action against the complaining employees, the Board arguably would have found no unfair labor practice, notwithstanding an ostensible bad faith motive to harass and intimidate them.

19. *Id.* at 109.

20. 90 N.L.R.B. 2020 (1950).

of his own, was an unfair labor practice.[21] The Board had stated in *Carter* that a person's right to resort to the courts was not absolute but was restricted by the law of abuse of process.[22] Thus, if an employer's lawsuit evinced an underlying anti-union motive, it was labeled an abuse of process, rejected as an invalid exercise of a protected right, and rendered susceptible to censure as coercive conduct constituting an unfair labor practice.[23]

Clyde Taylor expressly overruled *Carter*. The Board emphasized Chairman Herzog's dissent in *Carter* which insisted "that the Board should accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn the exercise of such right as an unfair labor practice."[24]

Board member Fanning, who wrote a concurring opinion in *Clyde Taylor*, was the sole defender of the abuse of process rationale in *Carter*. Although he agreed with the Board's ultimate result in *Clyde Taylor*, he argued that factual distinctions made it unnecessary to overrule *Carter*. He found the employer's conduct in *Carter* to be more pervasive than Taylor's[25] and was impressed that Taylor's actual use of civil proceedings did not bear a sufficiently close relationship to the achievement of anti-union objectives. Fanning agreed that an employer's *threatened* legal action constitutes an unfair labor practice, but he also insisted that an employer's *actual* lawsuit brought in bad faith against his employees renders an otherwise legitimate exercise of the absolute right to resort to the courts a violation of section 8(a)(1) of the NLRA.[26] Nevertheless, the doctrine articulated by the

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21. *Id.* at 2024.

22. It is "an abuse of legal process when such process is invoked in bad faith." *Id.*

23. *Id.* at 2024, *see id.* at 2023.

24. 127 N.L.R.B. at 109.

25. In *Carter*, the trial examiner had found that the employer also violated § 8(a)(1) by:

> (1) refusing to permit the holding of the outdoor meetings on company property; (2) causing peace officers to prevent such meetings; (3) following union organizers when they drove through the streets of the company-owned town; and (4) using a reporter to take notes at two open union meetings.

Id.

26. Member Fanning was "not persuaded by the record that [Taylor] resorted to the State court for injunctive relief in bad faith, that is, to defeat union organization of his employees rather than to protect any legitimate interest of his own," and therefore voted with other members of the Board to dismiss the allegation that Taylor violated § 8(a)(1) of the NLRA. *Id.* at 110. Member Fanning joined the Chairman and other members of the Board in holding that Taylor's threat to sue for libel interfered with, restrained, and coerced employees in the exercise of their rights guaranteed by § 7 of the NLRA. *Id. See*

majority in *Clyde Taylor* became a fortress protecting employers whose use of legal processes may have intentionally or unintentionally chilled employee exercise of section 7 rights.

In a related case decided by the Supreme Court, *Textile Workers Union v. Darlington Mfg. Co.*,[27] the majority recognized a right of managerial prerogative, the exercise of which would not violate section 8(a)(1) of the NLRA even though there might be some coincidental interference with section 7 rights. The Court concluded that an employer's decision to go out of business—even if completely motivated by anti-union animus —does not amount to an unfair labor practice.[28] Thus, the Supreme Court created an exception to the NLRA sections that restrict employer freedom, an exception built "around the nonstatutory concept of management prerogatives."[29] By implication the Court established a category of business decisions that section 8(a)(1) and its companion subsections of the NLRA could not restrict. An employer's right to sue in civil court may fall within the protected area of management prerogative.

B. United Aircraft Corp.: *The Board Refines the Rule Regarding Threats*

In *United Aircraft Corp.*,[30] the Board was called upon to review the propriety of an employer's threat of legal action to achieve a stronger bargaining position against its affiliated union.[31] Employees had previously filed charges with the Board, claiming that company supervisors at United Aircraft had engaged in unfair labor practices by threatening economic reprisals and by offering benefits conditioned upon abandonment of a strike.[32] In an attempt to induce the charging parties to withdraw their unfair labor practice charges, United Aircraft threatened civil action based on numerous legal claims that had arisen during a bitter strike against the company in 1960.[33]

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29 U.S.C. § 158(a)(1) (1976).

27. 380 U.S. 263 (1965).

28. *Id.* at 270.

29. Rabin, *Limitations on Employer Independent Action*, 27 VAND. L. REV. 133, 145 (1974).

30. 192 N.L.R.B. 382 (1971).

31. *Id.*

32. *Id.* at 383.

33. *Id.* at 384. Union members resorted to violence during the strike, causing property damage to homes and cars. Threatening phone calls were also made, intimidating employees desirous of returning to work. United Aircraft Corp. v. I.A.M., 70 L.R.R.M.

When the employees refused to drop their charges, United Aircraft brought an action against them in Connecticut Superior Court and secured judgments in excess of one million dollars.[34]

The employees amended their initial complaint, alleging that United Aircraft committed additional unfair labor practices by threatening to bring suit unless the unions withdrew their charges, and by actually bringing suit when the unions ultimately refused to capitulate, thereby coercing and restraining its employees in the exercise of their section 7 rights.[35] The Board, relying upon a literal interpretation of *Clyde Taylor,* dismissed the allegations that United Aircraft's actual lawsuit constituted an unfair labor practice. It reasoned that although a threat of legal action "calculated to restrain employees in the exercise of their rights" is a violation of section 8(a)(1), an actual suit is not similarly unlawful.[36] With continuing confidence in its prior interpretation of *Clyde Taylor,* the Board further concluded that United Aircraft's threat to file suit unless a settlement agreement was reached did not constitute the kind of tactic normally used to restrain employees in the exercise of rights guaranteed by the NLRA.[37] The Board viewed the opposing claims of the employer and the employees as potentially offsetting. It theorized, under what appears to be a common law notion of setoff,[38] that a threat to bring a civil action as part of a good-faith effort to negotiate a settlement of numerous claims, "with each party giving up its claims against the other," is not unlawful under the NLRA.[39] On appeal,[40] the Second Circuit approved the Board's

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2577, 2578 (Conn. Super. Ct. Hartford Cty. 1968).

34. 192 N.L.R.B. at 384.

35. *Id.*

36. *Id.* The Board reiterated its well established rationale "that 'the Board should accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn the exercise of such right as an unfair labor practice.' " *Id.* (quoting Clyde Taylor, 127 N.L.R.B. at 109). "The Board has consistently held that the filing of a civil suit cannot be found to be an unfair labor practice." *Id.* (footnote omitted). The Board's decision was upheld on appeal. Lodges 743 and 1746, Int'l Ass'n of Machinists & Aerospace Workers v. United Aircraft, 534 F.2d 422, 464 (2nd Cir. 1975).

37. 192 N.L.R.B. at 384 (quoting Clyde Taylor, 127 N.L.R.B. at 108).

38. Setoff is defined as a defense or independent claim made by a defendant to counterbalance that of the plaintiff. Studley v. Boylston Nat'l Bank, 229 U.S. 523, 528 (1913). It is sometimes characterized as a "mode of defense whereby the defendant acknowledges the justice of the plaintiff's demands on the one hand, but on the other, sets up a demand of his own to counterbalance it, either in whole or in part." 20 AM. JUR. 2D *Counterclaim, Recoupment, and Setoff* § 2 (1965) (footnote omitted).

39. 192 N.L.R.B. at 384.

40. Lodges 743 and 1746, Int'l Ass'n of Machinists and Aerospace Workers v. United

reasoning and observed:

> [T]he "threats" in this case were not conveyed by an employer to a single employee; they were an integral part of negotiations in which both sides were represented by sophisticated labor counsel who were more than familiar with the rights of the parties, and particularly the right to file unfair labor practice charges with the Board.[41]

The employer was credited with having a legitimate cause of action against his employees that he was willing to forego if they in turn would withdraw their unfair labor practice charges.[42]

In 1972 the Board decided *West Point Pepperell, Inc.*,[43] a case involving an employer's threat to sue its affiliated union unless unfair labor practice charges filed against the employer were withdrawn.[44] The employer advanced several legal theories justifying his threatened civil action against the union.[45] The employer, in essence, had admonished the union to either accept

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Aircraft, 534 F.2d 422 (2nd Cir. 1975).

41. *Id.* at 464.

42. *Id.* The Board had quoted Judge Gaffney who concluded in his Connecticut Superior Court decision that the employer did not "use these lawsuits for bargaining purposes to induce the defendants to withdraw their claims in their action in the United States District Court." 192 N.L.R.B. at 384 n.13 (quoting United Aircraft Corp., 70 L.R.R.M. at 2577, 2580). In essence, the state court found no express or implied purpose to use actual litigation to induce the charging parties to drop their unfair labor practice charges. The State Court, however, did not address the employer's use of threats prior to the actual lawsuit as a means of pressuring union members to abandon their unfair labor practice claims against the employer.

43. 200 N.L.R.B. 1031 (1972).

44. *Id.* at 1039.

45. The employer in *West Point Pepperell* alleged, *inter alia*, that the union breached its contract by filing charges against the employer. Although the Board did not discuss in detail the contractual agreement between the union and the employer, it criticized any provision in a contract that would prohibit access to the Board by a complaining party. Such a "prohibition *as a matter of public policy* would not be binding on the Board, nor, it would appear, on the Union." *Id.* (emphasis in original). The employer also contended that the unfair labor practices charges filed by the union were unmeritorious. The Board stated, however, that " 'access to the Board's processes for vindication of a statutory violation is fundamental and is to be kept open without roadblocks or hindrance. Neither employer nor union may restrain, coerce or interfere with that right, whether or not it deems the charge meritorious—a question for the Board, not a charged party, to decide. *See* Local 138, Int'l Union of Operating Engineers, AFL-CIO, 148 N.L.R.B. 679, 681.' " *Id.* (quoting W. T. Grant Co., 168 N.L.R.B. 93, 96 (1967)). In addition, the Board in *West Point Pepperell* cited, *inter alia*, Waterman Industries Inc., 91 N.L.R.B. 1041, 1043 n.8 (1950) (does not matter even if charge proved invalid after trial on the merits and N.L.R.B. v. Scrivener, 404 U.S. 821 (1972) (all persons with information concerning unfair labor practices are to be free from coercion in bringing them before the Board).

the contention that the union's unfair labor practice charges were unlawful and withdraw them, or face the costly consequences of a lawsuit.[46] The Board concluded that the employer's threat was without legal foundation and that it constituted a bad faith attempt to clothe with the integrity of the legal process the employer's designs to interfere with, coerce, and restrain its employees in the exercise of their protected rights under the NLRA.[47] The Board rejected the employer's reliance on *United Aircraft* by distinguishing the ostensible groundlessness of the threatened legal action in *West Point Pepperell* from the unquestionable legitimacy of the legal claims asserted against the union in *United Aircraft Corp.* The Board found West Point Pepperell's threat to be "retaliatory in nature, as in *Taylor,* and not remotely connected with a conciliatory move, as in *United Aircraft.*"[48]

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46. The Board has consistently found it to be an unfair labor practice for an employer to threaten employees with legal action in an attempt to hinder employees from exercising their rights under § 8 of the NLRA. For example, in S.E. Nichols Marcy Corp., 229 N.L.R.B. 75 (1977), the employer's supervisor told the employee that if rumors of her union membership became known to the manager she would be fired. She repeated this conversation at two separate employee meetings. During the course of the second, the company president told her to " 'shut her mouth' because she could be sued for saying such things." *Id.* at 79. The Board held this threat to be coercive and thus violative of § 8(a)(1). *But see* Clyde Taylor Co., 127 N.L.R.B. 103, 109 (1960).

47. The trial examiner stated, "I am convinced and find from the timing of the letter [threatening to file suit] in relation to the filing of the charge, and from the contents of the letter, that the letter was touched off by the charge and was substantially if not entirely directed at it." 200 N.L.R.B. at 1039. There is a clear distinction between negotiating to setoff opposing well-founded legal claims to avoid the inevitable cost and inconvenience of multiple proceedings and grasping at straws to substantiate a threat of a retaliatory lawsuit unless unfair labor practice charges are dropped. In a case involving a union's threat to file a lawsuit against an employer for breach of a subcontracting clause in their collective bargaining agreement, the purpose of the threat being to coerce the employer to cease doing business with a non-union subcontractor, the Board recognized the existence of a legitimate cause of action for breach of contract and concluded that the threat was not "a groundless threat simply calculated to unlawfully harass and coerce the Company." Los Angeles Bldg. & Constr. Trades Council, 217 N.L.R.B. 946, 949 (1975). The Board reasoned that the union was entitled to enforce the terms of the collective bargaining agreement in a competent jurisdiction and logically had a concomitant right to threaten such action in order to give the employer an opportunity to abide by the contract and avoid a lawsuit. *Id.* at 948.

48. 200 N.L.R.B. at 1040. "Unlike *United Aircraft,* there was here no implied recognition of the statutory right to file a charge and in that context a suggested 'tradeoff' or settlement of conflicting claims growing out of a strike." *Id.*

C. *Refinement of the Absolute Right to Sue*

In *Fashion Fair, Inc.*,[49] decided in 1964, the Board exhibited remarkable obeisance to a literal interpretation of *Clyde Taylor*. There was ample evidence on the record that Fashion Fair had been motivated primarily by anti-union animus in obtaining a state court injunction banning peaceful picketing. The Board determined that the injunction obtained by Fashion Fair was without a legal basis under Indiana law and was "essentially motivated by [a] continuing aversion to the Union and by a desire to harass the picketers in the exercise of their protected concerted activities."[50] Nevertheless, the Board sustained its existing policy of not enforcing the NLRA in a manner that impinged upon the right of all persons to litigate their claims in court;[51] it did not attempt to distinguish the facts from those in *Clyde Taylor*. It appeared that any lingering notions of motive and intent[52] as controlling factors in judging employer use of legal processes to achieve management objectives suffered a general *coup de grace* at the hands of the Board in *Fashion Fair*.[53]

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49. 159 N.L.R.B. 1435 (1964).

50. *Id.* at 1449.

51. *Id.*

52. The Board affirmed the trial examiner's decision in Television Wisconsin, Inc., 224 N.L.R.B. 722 (1976), which included a footnote stating that "[i]n *Taylor* the Board distinguished between threat to sue and the filing of a suit without seemingly distinguishing between the intent behind them." *Id.* at 780 n.80.

53. If there ever was an opportunity to apply Member Fanning's ostensible adherence to *Carter* and the legitimate motivation test advanced in his concurring opinion in *Clyde Taylor*, this would be the case. The unfair labor practices perpetrated by the employer in *Fashion Fair, Inc.* correspond qualitatively to those in *Carter* and, according to Member Fanning, would be distinguishable from conduct in *Clyde Taylor* since they "bear a closer relationship to the obtaining of injunctive relief." Clyde Taylor Co., 127 N.L.R.B. 103, 110 (1960). The Board, however, adopted the majority view in *Clyde Taylor* and acknowledged an apparent absolute right to invoke the legal process in spite of anti-union animus.

In D.C. International Inc., 162 N.L.R.B. 1383 (1967), the Board approved the trial examiner's reliance on *Clyde Taylor* in dismissing alleged unfair labor practice charges against an employer who requested police officers to arrest a discharged employee who refused to leave company property. The employee claimed that his arrest was spawned by unfair labor practice charges he had filed against his former employer for discriminatory termination of employment. In a footnote accompanying his decision, the trial examiner displayed his confidence in the well accepted rule of *Clyde Taylor*:

> Were I not convinced that the principle of *Clyde Taylor Co.*, 127 N.L.R.B. 103, required dismissal of the allegation herein, I would recommend dismissal of the allegation on the basis that the preponderance of the evidence does not reveal that the Respondent [employer] caused Stanley's arrest because he had filed unfair labor practices under the Act with the Board.

Id. at 1394 n.14. The trial examiner considered the rule in *Clyde Taylor* to be an abso-

The supposed *coup de grace* was short lived as the Board has revived a motive and intent test in a series of cases featuring unfair labor practice allegations against unions for filing lawsuits against their members to enforce disciplinary fines (hereinafter referred to as the "union-plaintiff cases"). In *Retail Clerks Union Local 770,*[54] the Board held that resort to the courts to confirm an arbitrator's award and enforce an alleged contract right was not violative of section 8(b)(4)(ii)(a) of the NLRA since the union acted in good faith.[55] However, in *United Stanford Employees, Local 680,*[56] the Board held that a lawsuit seeking to compel employees to sign articles of membership in the union and to perform acts necessary to retain membership in the union constituted an unfair labor practice since the suit sought to enforce unlawful objectives.[57]

The Board reached a similar result in *Television Wisconsin, Inc.,*[58] where the Communications Workers of American sought judicial enforcement of a collective bargaining agreement that required employees as a condition of employment to meet obligations beyond the payment of dues and initiation fees. Since such obligations—imposed by an unlawful union security clause and a separate clause restraining employees from exercising their right to cross picket lines—were illegal under the NLRA, the Board held that legal action taken by the union to enforce them constituted a violation of sections 8(b)(1)(A) and 8(b)(2). In *Television Wisconsin, Inc.*, the trial examiner concluded that "the rationale of the *Retail Clerks* case [suggests that the *Clyde Taylor*] holding has been substantially modified and that the Board has narrowed its accommodation of its enforcement of the Act to the right of all persons to litigate their claims in court."[59]

This narrowing of the *Clyde Taylor* doctrine of accommoda-

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lute rule guaranteeing the right to invoke legal processes and precluding an exploration of the facts to discern motive, intent, or anti-union animus. Only in the absence of *Clyde Taylor* would the trial examiner feel compelled to examine the employer's state of mind and underlying purpose in invoking the legal process against Stanley, his employee.

54. 218 N.L.R.B. 680 (1975).

55. The court determined the action "was held not to be the kind of *tactic calculated to restrain* employees or employers in the exercise of rights guaranteed by the Act." *Id.* at 683 (emphasis added).

56. 232 N.L.R.B. 326 (1977).

57. *Id.* "This was an unlawful objective inasmuch as the Act permits unions to impose only financial core obligations on employees in the administration of contractual union-security provisions." *Id.* at 331.

58. 224 N.L.R.B. 722 (1976).

59. *Id.* at 780.

tion has not been limited to legal action taken by unions against their members. The Board, for example, has also refused to accommodate its enforcement of the NLRA to the right of a landowner to engage state police support to prevent peaceful picketing on private property leased to an employer. Recognizing the right of employees to picket their employer at his primary location, the Board held in *Frank Visceglia*[60] that restriction of access to such property—motivated by anti-union animus and accomplished in part by requesting police arrests of employees who persisted in picketing—constituted a violation of section 8(a)(1).[61] Lawsuits attempting to enforce obviously *unlawful objectives,* whether pursued by unions, employers, or anyone else, were declared to be outside the fortress erected by *Clyde Taylor* around one's absolute right to invoke the legal process.[62]

II. *Power Systems Inc.*: Improper Consideration of Anti-Union Motivation

In *Power Systems, Inc.*,[63] the Board found that because Power System's lawsuit had been filed without probable cause and had been motivated by anti-union animus, it was not privileged by the Board's *Clyde Taylor* policy of "accommodating its processes to the normal right of all parties to resort to the civil courts" to adjudicate their claims.[64] The Board ordered Power

60. 203 N.L.R.B. 265 (1973).

61. *Id.* The Board reasoned that the Respondent's lease to the employer, accompanied by a right of access granted to employees of the lessee, gave employees a parallel right of access for picketing. The road was a "limited access road" indicating the respondent's intent to permit its use by classes of persons acceptable to the respondent. Employees of the lessee were necessarily contemplated members of that class, and the respondent's resort to legal processes, *i.e.*, requesting arrests of picketing employees constituted interference with the employee's exercise of § 7 rights. *Id.* at 266-67.

62. *See, e.g.*, Int'l. Org. of Masters, Mates, and Pilots, 224 N.L.R.B. 1626 (1976). There the administrative law judge concluded that the union's action was "an afterthought, constituting a strategem to mask Respondents' real intent." *Id.* at 1626 n.2. The union's lawsuit was found to have been filed in pursuit of unlawful objectives, and therefore unprotected by the *Clyde Taylor* doctrine. The District of Columbia Circuit confirmed the Board's decision adding that the language in *Clyde Taylor*

> does not indicate that the filing of a lawsuit will never be regarded as an unfair labor practice . . . . Rather, the language is, in our view, a mere expression of a general liberality in accommodating the filing of lawsuits. Where, as here, the lawsuit . . . was intimately related to ongoing picketing for an unlawful objective . . . we can see no inconsistency between *Clyde Taylor Co.* [and its progeny] and the Board's determination in this instance.

Int'l Org. of Masters, Mates and Pilots v. NLRB, 575 F.2d 896, 906-07 (D.C. Cir. 1978).

63. 239 N.L.R.B. 445 (1978).

64. *Id.* at 449.

Systems to refrain from prosecuting its state court action against Sanford and ordered Power Systems to reimburse Sanford for the costs he incurred in defending against the lawsuit.

The Board explained its departure from a literal application of *Clyde Taylor* on the basis of *Retail Clerks, United Stanford Employees,* and *Television Wisconsin, Inc.,* which teach that lawsuits brought in furtherance of "unlawful objectives" are not accorded *Clyde Taylor* protection.[65] The Board apparently attempted to distinguish between lawsuits nourished by hostility toward employee exercise of section 7 rights and lawsuits that are not used tactically to restrain employees from exercising such rights.[66]

In refusing to enforce the Board's order against Power System, the Seventh Circuit emphasized that its holding was a narrow one.[67] It had merely concluded upon a review of the whole record that insufficient evidence existed to support the Board's finding that Power Systems filed its lawsuit without probable cause and for an improper purpose. The court did not question the Board's salient departure from its well-established policy of strictly accomodating one's right of access to the courts.[68] In addition, it failed to examine whether the Board possessed power to censure an employer's lawsuit against his employee as an unfair labor practice.

III. Criticism of *Power Systems Inc.*

In *Power Systems Inc.*, the Board wanted to engraft motive and intent onto the *Clyde Taylor* rule, even though *Clyde Taylor* wielded the scalpel by which they were severed from the traditional process of detecting an unfair labor practice. By focusing upon the coercive effect of Power Systems' lawsuit

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65. *Id.* at 449-50. The Board acknowledged that it had "on several occasions departed from a literal application of *Clyde Taylor* where the civil lawsuit was brought in order to pursue an unlawful objective." *Id.* at 449. While each of those cases dealt with a lawsuit filed by a labor union, the Board concluded that there is "no reason to apply a different standard to an employer that institutes a civil lawsuit with an unlawful objective against an employee." *Id.* at 450.

66. *Id.* at 449-50.

67. Power Systems, Inc. v. NLRB, 601 F.2d 936 (7th Cir. 1979).

68. The court observed that "the Board did not reject the principle in *Clyde Taylor*, . . . that the filing of a civil complaint by an employer or labor organization against an employee or member does not violate the Act." *Id.* at 938. While the the Board did not expressly reject *Clyde Taylor*, it departed from the traditional application of the *Clyde Taylor* principle of protecting an employer's absolute right to invoke the legal process.

against its employees and by defining it as an "unlawful objective," the Board found an unfair labor practice despite the implied charge in *Clyde Taylor* to avoid scrutinizing the intent or motive underlying one's resort to the legal process. The Board appears to have tacitly applied the abuse of process doctrine and consequently to have returned to its position in *Carter* without admitting it.[69]

The Board refused to acknowledge Power Systems' legal claim as an action brought in good faith, even though it expressed a proper purpose on its face. The Board looked beyond the legal objectives of the lawsuit to scrutinize underlying motives and divine the *actual purpose* for which it was filed. This simply amounts to a revival of *Carter* and its attendant abuse of process limitation on an employer's absolute right to invoke the legal process.[70]

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69. Recall that *Carter* limited an employer's absolute right to resort to the courts "by the law of malicious prosecution and wrongful initiation of civil proceedings." 90 N.L.R.B. at 2024. Malicious prosecution consists of any proceeding of a criminal character initiated without probable cause, with malice, or a primary purpose other than achieving just prosecution of an offender. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 835 (4th ed. 1971). *See* RESTATEMENT (SECOND) OF TORTS §§ 653, 672 (1972). The Board is usually concerned with "wrongful initiation of civil proceedings" or abuse of process rather than malicious prosecution. The authors of the Restatement have articulated a distinction between malicious prosecution and abuse of process:

> [Abuse of process] is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed under the rule. *Id.* § 682, Comment a.

70. Member Fanning, who dissented in *Clyde Taylor* and argued against overruling *Carter*, is now Chairman of the NLRB. The motive and intent analysis he adhered to in *Clyde Taylor* now forms a large part of the Board's analysis.

The Seventh Circuit reversed the Board in Power Systems, Inc. v. NLRB, 601 F.2d 936 (7th Cir. 1979). The court, however, intimated "no view on the scope of the Board's power to determine, in circumstances other than those presented [in the instant case], that the filing of a civil action based upon the defendant's charge filed with the Board is an unfair labor practice." *Id.* at 940. Instead, it merely rejected the Board's findings of fact regarding Power System's bad faith motive in pursuing an action in court for the purpose of chilling an employee's exercise of § 7 rights. *Id.* The court recognized "that civil actions for malicious prosecution carry with them a potential for chilling employee compaints to the Board and that the Board may, in a proper case, act to curb such conduct." *Id.*

A. Abuse of Process Theory Misapplied

Abuse of process has traditionally been found only where the legal process is used "against another *primarily* to accomplish a purpose for which it is not designed."[71] Dean Prosser identifies the essential elements of abuse of process as "first, an ulterior purpose, and second, a *willful act* in the use of the process not proper in the regular conduct of the proceeding."[72] Notwithstanding "an incidental motive of spite or an ulterior purpose or benefit" to the employer, there is no "abuse of process when the process is used for the purpose for which it is intended."[73] The improper purpose element of common law abuse of process "usually takes the form of coercion to obtain a collateral advantage, not properly invoked in the process itself, by . . . the use of process as a threat or a club."[74]

The abuse of process doctrine is highly susceptible to misapplication when employed in adjudicating emotionally charged labor relations conflicts. Enforcement of the NLRA presupposes a struggle between management and labor to achieve self-serving political and financial objectives—a rivalry typically fraught with feelings of contempt and distrust. Consequently, a lawsuit filed by an employer against an employee or a union is intuitively clothed with a shroud of suspect bad motive, tempting the Board to find an unfair labor practice.

In *Clyde Taylor* the Board correctly regarded Taylor's unfettered right of access to the courts to sue employees for libelous statements published against him. Yet the Board was also correct in declaring Taylor's threat to sue, a club he wielded over the heads of his employees to obtain collateral advantage, to be beyond the protection accorded his right to invoke the legal process.[75]

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71. RESTATEMENT (SECOND) OF TORTS § 682 (1974) (emphasis added). Abuse of process consists of "misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish." W. PROSSER, *supra* note 69, at 856 (footnote omitted).

72. W. PROSSER, *supra* note 69, at 857 (footnote omitted) (emphasis added).

73. RESTATEMENT (SECOND) OF TORTS § 682, Comment b (1971).

74. W. PROSSER, *supra* note 69, at 857. "There is, in other words, a form of extortion, and it is what is done in the course of negotiating rather than the issuance or any formal use of the process itself, which constitutes the tort." *Id. See* F. HARPER & F. JAMES, THE LAW OF TORTS 331 (1956). (One commits a tort the moment he attempts to achieve some collateral objective outside the scope and operation of the process employed.)

75. A willful misapplication of process contemplates a "definite act or threat not

In *Fashion Fair, Inc.* the Board properly adhered to the rule formulated in *Clyde Taylor*. Notwithstanding the employer's obvious aversion to the union and his unquestionable intention to "harass the picketers in the exercise of their protected concerted activities"[76] by pursuing a state court injunction, the Board found no abuse of process since the employer used the legal process for the purpose for which it was intended and did not engage in collateral coercive conduct.[77]

Proper limitation of the abuse of process theory was also demonstrated by the Board's decision in *United Aircraft Corp.*, which was subsequently affirmed by the Second Circuit. The Board not only acknowledged the validity of United Aircraft's actual suit against the union, but concluded that its threat to sue unless opposing charges were withdrawn was also permissible since it was directly related to a good faith attempt to negotiate a setoff of claims.[78] Quoting the Board's Chairman Herzog, the Second Circuit concluded in *Lodges 743 and 1746, International Association of Machinists v. United Aircraft Corp.*,[79] that despite probable improper motivation for both threatening to bring and actually bringing a lawsuit against the union, "the 'Board should accommodate its enforcement of the statute to the traditional right of all to bring their contentions to the attention of a judicial forum, rather than hold it to be an unfair labor practice for them to attempt to do so.' "[80]

The Court rejected the application of the abuse of process doctrine to defeat an employer's right to resort to legal processes just because anti-union objectives may be inevitably furthered:

> But even if we assume that the Company was improperly motivated—that it intended the suit to induce the Union to withdraw its charges—this alone would not make resort to the

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authorized by the process, or aimed at an objective not legitimate in the use of the process." W. PROSSER, *supra* note 69, at 857. The Board in *Clyde Taylor* gave judicial effect to this interpretation of the doctrine by declaring a threat to sue, calculated to inhibit employees in the exercise of their rights, to be an unfair labor practice. An actual suit, however, processed to its designed end, could not constitute an unfair labor practice.

76. 159 N.L.R.B. at 1449 (footnote omitted).

77. The Board acknowledged the anti-union motivation accompanying the employer's lawsuit but implicitly rejected any application of abuse of process theory to challenge his right to resort to legal process. *Id.*

78. 192 N.L.R.B. at 384. *Cf.* West Point Pepperell, Inc., 200 N.L.R.B. 1031, 1039 (1972) (threat to sue was motivated purely by anti-union animus and responded directly to the filing of unfair labor practice charges by the union).

79. 534 F.2d 422 (2d. Cir. 1965).

80. *Id.* at 464 (quoting *Carter*, 90 N.L.R.B. at 2029).

> courts unlawful so as to justify an unfair labor practice finding. *Abuse of process requires more than simply improper motive.* There must also be some action taken to utilize the court's processes for collateral purposes not related to the suit in question.[81]

In short, the abuse of process doctrine should only defeat an employer's right to resort to the courts when coercive measures are employed that are unnecessary to the pursuit of judicial proceedings.[82]

B. The Board's Improper Reliance on the Union-Plaintiff Cases

In condemning Power Systems' lawsuit as an unfair labor practice, the Board found support for its decision in the series of union-plaintiff cases which had censured the use of legal process to accomplish "unlawful objectives," such as compelling employees to accept union obligations beyond the scope of the NLRA,[83] enforcing illegal union-security clauses,[84] and restraining or coercing employers in the selection of representatives for collective-bargaining purposes.[85] In each instance a labor organization was held to have invoked the legal process to pursue an end having no legal foundation. In focusing its attention on the illicit purposes of the lawsuits in these cases, the Board curiously failed to distinguish *malicious use of process,* the tort actually committed in these cases, from *abuse of process,* the only plausible tort supported by the facts in *Power Systems, Inc.*

Abuse of process differs from *malicious use of process* in that the latter is committed by "commencing an action or causing process to issue *without justification,*"[86] whereas the former

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81. *Id.* at 464-65 (footnote omitted).

82. *Id.* at 465.

83. United Stanford Employees, Local 680, 232 N.L.R.B. 326, 331 (1977) (union filed lawsuit seeking damages for breach of contract and compelling specific performance of oral employment contracts with employer which bound employees to accept union membership).

84. Television Wisconsin, Inc., 224 N.L.R.B. 722, 780 (1976) (civil action filed by union against employees who resigned from union as a means of collecting fines assessed for violation of union-security clause that exceeded the limited form permitted by the proviso to § 8(a)(3) of the NLRA.

85. IOMMP, 224 N.L.R.B. 1626, 1634-35 (1976) (Union's *in rem* action against the ship owner's vessel had as its purpose the compulsion of owners to accept union's bargaining agreement and replace bargaining representative with union members).

86. W. PROSSER, *supra* note 69, at 856 (emphasis added).

consists of exploitation of process issued *with justification. Malicious use of process* is the wrongful initiation of civil proceedings against another "without probable cause, that is, without a reasonable basis for thinking the claim . . . asserted [is] valid."[87] *Abuse of process,* on the other hand, is evidenced by conduct collateral to normal processes of a lawsuit that abuses an otherwise legitimate claim based on probable cause.

The Board's overriding emphasis on motive and intent in deciding *Power Systems, Inc.* compounded this confusion in distinguishing abuse of process from malicious use of process. Power Systems' lawsuit was legitimate on its face—the company sought to recover expenses incurred in defending charges filed maliciously and without probable cause by Sanford. The Board was nevertheless determined to make an issue out of Power Systems' palpable antipathy toward Sanford and his use of the Board's processes. The Board explained its decision in *Power Systems, Inc.* with language borrowed from the union-plaintiff cases. It declared that Power Systems "had no *reasonable basis* for the filing of its lawsuit"—language that suggests a finding of malicious use of process.[88] But in stating the facts, the Board described a proper legal action seeking a designated lawful result, the objectives of which were neither illegal nor without a reasonable belief of validity.[89] The Board only assailed Power Systems' collateral objectives of penalizing Sanford for filing charges with the Board and discouraging employees from using the Board's processes. Intimating that Power Systems' lawsuit was otherwise legitimate, the Board concluded that it was nevertheless an unfair labor practice since its *true purpose* was to punish Sanford for asserting his rights under the NLRA and to restrain him from asserting those rights in the future—an unmistakable articulation of the elements of abuse of process.[90]

The Board's reliance on the union-plaintiff cases was inap-

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87. F. HARPER & F. JAMES, *supra* note 74, at 329. *See* RESTATEMENT (SECOND) OF TORTS § 682, Comment a (1972).

88. 239 N.L.R.B. at 450.

89. Power Systems, Inc. v. NLRB, 601 F.2d 936, 938-40 (7th Cir. 1979).

90. *See* 239 N.L.R.B. at 450. In rejecting the Board's conclusion that employer's lawsuit was without a reasonable basis, the Seventh Circuit in Power Systems, Inc. v. NLRB, 601 F.2d 936, 940 (7th Cir. 1979), suggests its approval of this latter characterization. The employer approached the Board prior to its initiation of the state court action to inquire whether its contemplated suit would violate the NLRA. This fact considered with the stipulated facts on the record negate any notion that Power Systems, Inc. pursued its action in state court without believing that it had a reasonable basis.

propriate since their departure from *Clyde Taylor* was uniquely based on an implicit finding of malicious use of process, whereas the Board in *Power Systems, Inc.* clearly articulated the elements of abuse of process. Because no coercive collateral conduct accompanied the lawsuit, and because ostensible anti-union motivation alone is insufficient to substantiate a finding of abuse of process,[91] the Board was in the precarious position of finding one tort by analyzing the facts, calling it another name by straining precedent, and being unable to sustain either upon the record. The Board's confusion was caused by its renewed flirtation with the notions of motive and intent, a result that demonstrates the error of straying from a literal interpretation of *Clyde Taylor.*

C. *Managerial Prerogative and the Irrelevance of Motive and Intent*

An employer's decision to invoke the legal process is a business decision, an exclusive exercise of managerial prerogative. Section 8(a)(1) of the NLRA broadly restricts those exercises of managerial prerogative that tend "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section [7]" of the Act.[92] Anti-union motivation was initially an essential element of subsections 8(a)(2)-(5) but not subsection 8(a)(1).[93] Judicial interpretations eventually blurred the distinction concerning motive.[94] Consequently, a balancing test consid-

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91. The Seventh Circuit's reversal of the Board's decision was very narrow; the court refused to comment on anything other than the lack of substantial evidence to support the Board's findings. *Id.* The confusion caused by the Board's misapplication of the abuse of process theory and the Seventh Circuit's refusal to comment on the correct application of the *Clyde Taylor* doctrine demonstrates the need for a closer examination by the Board and the courts of the direction taken by the Board.

92. 29 U.S.C. § 158(a)(1) (1976).

93. *See* Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs, and Tails,* 52 CORNELL L.Q. 491 (1967).

94. *Id.* at 496-97. Section 8(a) provides:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

ering motive and intent as determinative weights has been applied under section 8(a)(1) as well as under other subsections dealing with particular instances of intentional discriminatory conduct.[95] An employer's bona fide interest in furthering managerial objectives is typically weighed against the corresponding impact on employee rights under the NLRA. This emphasis on motive and intent in reviewing business decisions alleged to be in violation of the NLRA apparently caused the Board to adopt a similar mind-set in reviewing an employer's initiation of legal proceedings against employees.

In *Textile Workers Union v. Darlington Manufacturing Co.*,[96] the United States Supreme Court isolated a particular category of managerial prerogative, the exercise of which would not constitute a violation of section 8(a)(1) notwithstanding coincidental interference with section 7 rights. Justice Harlan's majority opinion declared that an employer's decision to go out of business, although inspired totally by anti-union animus, was not an unfair labor practice since the "proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act."[97] A judicial exception was thus "engrafted upon the otherwise plain language of the respective sections limiting employer freedom, [an exception that] has been built around the nonstatutory concept of management prerogatives."[98] Accordingly, the Court established by implication a category of business decisions that were intended to remain unscathed by section 8(a)(1) and its companion subsections.[99]

The decision to invoke the legal process arguably represents the kind of managerial prerogative protected by *Darlington*, a right so fundamental to the concept of free enterprise that its

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(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

95. *See* Rabin, *Limitations on Employer Independent Action*, 27 VAND. L. REV. 133, 137 (1974).

96. 380 U.S. 263 (1965).

97. *Id.* at 270.

98. Rabin, *supra* note 95, at 145.

99. *See* American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965). "[W]e have consistently construed the section to leave unscathed a wide range of employer action taken to serve legitimate business interests in some significant fashion, even though the Act committed may tend to discourage union membership." *Id.* at 311.

deprivation should be considered only after the "clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act."[100] No such intent is manifest.

Clyde Taylor implicitly rejected the use of a balancing test where an employer's interest in the private managerial function of initiating a lawsuit is weighed against the corresponding impact on employee rights under the NLRA. The Board concluded that in enforcing employee rights under the NLRA, it would accommodate the absolute right of all persons to litigate their claims in court. Such accommodation does not contemplate the traditional balancing approach employed in reviewing other types of business decisions that negatively impact on section 7 rights. Accommodation signifies the attitude prescribed by the Supreme Court in *Darlington.* The Court stated, in effect, that it would *accommodate* its enforcement of the NLRA to the right of all employers to go out of business;[101] it would abandon the balancing scales when the exercise of paramount rights of managerial prerogative are challenged as unfair labor practices. In *Clyde Taylor* the Board announced its decision to accord the same presumptive protection to the specific right to invoke the legal process. The Board's anomalous departure from a literal interpretation of *Clyde Taylor* in *Power Systems Inc.* is either a manifestation of progressive atrophy in its ability to comprehend the soundness of its prior reasoning, or an intentional return to the *Carter* approach spawned by renewed veneration of a test based on motive and intent. In either case, the Board should have recognized after *Darlington* that only a literal application of *Clyde Taylor* is consistent with the policy established by the Supreme Court in this protected area of managerial prerogative.

IV. Conclusion

Subsection 8(a)(1) and its companion subsections place restrictions on certain types of business conduct that have a coercive or restraining effect on employees' exercise of section 7

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100. Textile Workers Union v. Darlington Mfg. Co., 380 U.S. at 270.

101. The Court acknowledged the general attitude among the courts of appeals which had "generally assumed that a complete cessation of business will remove an employer from future coverage by the Act." *Id.* at 270-71. "The Act 'does not compel a person to become or remain an employee. It does not compel one to become or remain an employer.' " *Id.* at 271 (quoting Darlington Mfg. Co. v. NLRB, 325 F.2d 682 (4th Cir. 1963)).

rights. In enforcing the NLRA, the Board is called upon to balance the respective interests of management and labor. An employer's interest in achieving particular business objectives is weighed against the corresponding impact on employees' rights under the NLRA. Conduct that tends to coerce or interfere with section 7 rights constitutes an unfair labor practice unless the coercive impact is both slight and merely incidental to the pursuit of legitimate management objectives. In the balancing process, anti-union animus is a significant factor "When an employer is motivated by anti-union animus, the danger of interference with the alarm that employees will feel about the exercise of Section 7 rights is always increased."[102]

Employer lawsuits potentially impact on employees' exercise of section 7 rights. However the Board recognized in *Clyde Taylor* the paramount importance of an employer's right to invoke the legal process and announced that it would accommodate its enforcement of the NLRA to the right of employers to litigate their claims in court. The Board rejected the traditional balancing approach, which among other things, weighed the motive and intent underlying an employer's resort to legal processes. Although a threat to sue if employees did not abandon their section 7 rights continued to be an unfair labor practice, the actual filing of a lawsuit was left unscathed by the statutory restrictions of section 8.[103]

The Board's gradual departure from the literal interpretation of *Clyde Taylor,* culminating in *Power Systems, Inc.*, represents a rejection of sound public policy. The Board's implicit reliance on an abuse of process theory is not well founded since anti-union animus alone is insufficient to corrupt an otherwise valid lawsuit. There can be no abuse of process absent collateral conduct that deviates from the normal pursuit of a legal claim to its designed end. The Board errs in labeling anti-union motivation an "unlawful objective" in order to invalidate a lawsuit as

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102. Shieber & Moore, *Section 8(a)(3) of the National Labor Relations Act: A Rationale—Part II, Encouragement or Discouragement of Membership in any Labor Organization and the Significance of Employer Motive,* 33 LA. L. REV. 1, 23 (1972) (footnote omitted).

103. The Ninth Circuit has stated without qualification that "the Board consistently has held that despite the coercive effect upon employees' statutory rights, the filing of a civil suit by an employer or by a union cannot be found to be an unfair labor practice." Bergman v. NLRB, 577 F.2d 100, 103 (9th Cir. 1978); *accord,* IAMAW v. United Aircraft Corp., 534 F.2d 422, 464-65 (2d Cir. 1975), *cert. denied,* 429 U.S. 825 (1976); Smith Steel Workers v. A.O. Smith Co., 420 F.2d 1, 9 (7th Cir. 1969).

an abuse of process or a malicious use of process.

The Board also violates the spirit of *Darlington* by failing to recognize a specific instance of managerial prerogative that lies beyond the appropriate reach of motive and intent analysis. *Clyde Taylor* correctly characterized the right to resort to the courts as a right deserving strict accommodation by the Board in its enforcement of the NLRA. Only strict accommodation binds the fallible hands of those who attempt to shape unfair labor practices from anti-union animus.

Val John Christensen